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13 *Pro Hac Vice*

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15 **IN THE UNITED STATES DISTRICT COURT FOR**  
16 **THE DISTRICT OF ARIZONA**

17 Sidney Naiman, individually and on behalf  
18 of a class of all persons and entities similarly  
19 situated,

20 Plaintiff,

21 vs.

22 Hard Tack, Inc.; and Nation Motor Club,  
23 LLC

24 Defendants.

Case No. 2:19-cv-01738-JJT

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**Preliminary Statement**

1  
2 1. “Month after month, unwanted robocalls and texts, both telemarketing and  
3 informational, top the list of consumer complaints received by” the Federal  
4 Communications Commission (“FCC”).<sup>1</sup>  
5

6 2. Plaintiff Sidney Naiman brings this action under the Telephone Consumer  
7 Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in response to  
8 widespread public outrage about the proliferation of intrusive, nuisance telemarketing  
9 practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).  
10

11 3. In violation of the TCPA, Nation Motor Club, LLC (“Nation Motor”) hired  
12 the co-defendant, Hard Tack, Inc. (“Hard Tack”), who made telemarketing calls to a  
13 cellular telephone number of Mr. Naiman for the purposes of advertising Nation Motor  
14 goods and services using an automated dialing system and a pre-recorded message, which  
15 is prohibited by the TCPA.  
16

17 4. Hard Tack made these calls because of an agreement with Nation Motor,  
18 who hired Hard Tack to generate business through telemarketing, and maintained interim  
19 control over their actions.  
20

21 5. The Plaintiff never consented to receive the calls, which were placed to him  
22 for telemarketing purposes. Because telemarketing campaigns generally place calls to  
23 thousands or even millions of potential customers *en masse*, the Plaintiff brings this  
24 action on behalf of a proposed nationwide class of other persons who received illegal  
25 telemarketing calls from or on behalf of the Defendants.  
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<sup>1</sup> *Omnibus TCPA Order*, GC Docket 02-278, FCC 15-72, 2015 WL 4387780, ¶1 (July 10, 2015).



1 telephone number in this District. As such, a substantial part of the events giving rise to  
2 the claims occurred in this District.

3  
4 **TCPA Background**

5 12. In 1991, Congress enacted the TCPA to regulate the explosive growth of  
6 the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted  
7 telemarketing . . . can be an intrusive invasion of privacy.” Telephone Consumer  
8 Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).  
9

10 13. The TCPA makes it unlawful “to make any call (other than a call made for  
11 emergency purposes or made with the prior express consent of the called party) using an  
12 automatic telephone dialing system or an artificial or prerecorded voice . . . to any  
13 telephone number assigned to a . . . cellular telephone service.” *See* 47 U.S.C. §  
14 227(b)(1)(A)(iii). The TCPA provides a private cause of action to persons who receive  
15 calls in violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).  
16  
17

18 14. According to findings by the Federal Communication Commission  
19 (“FCC”), the agency Congress vested with authority to issue regulations implementing  
20 the TCPA, such calls are prohibited because, as Congress found, automated or  
21 prerecorded telephone calls are a greater nuisance and invasion of privacy than live  
22 solicitation calls, and such calls can be costly and inconvenient.  
23  
24

25 15. The FCC also recognized that “wireless customers are charged for  
26 incoming calls whether they pay in advance or after the minutes are used.” *In re Rules*  
27  
28

1 *and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-  
 2 278, Report and Order, 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003).

3  
 4 16. In 2013, the FCC required prior express written consent for all autodialed  
 5 or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.  
 6 Specifically, it ordered that:

7 [A] consumer’s written consent to receive telemarketing robocalls must be  
 8 signed and be sufficient to show that the consumer: (1) received “clear and  
 9 conspicuous disclosure” of the consequences of providing the requested  
 10 consent, i.e., that the consumer will receive future calls that deliver  
 11 prerecorded messages by or on behalf of a specific seller; and (2) having  
 12 received this information, agrees unambiguously to receive such calls at a  
 13 telephone number the consumer designates.[] In addition, the written  
 14 agreement must be obtained “without requiring, directly or indirectly, that  
 15 the agreement be executed as a condition of purchasing any good or  
 16 service.[]”

17 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,  
 18 27 F.C.C. Rcd. 1830, 1844 (2012) (footnotes omitted).

19 17. “Robocalls and telemarketing calls are currently the number one source of  
 20 consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016),  
 21 <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC  
 22 chairman).

23 18. “The FTC receives more complaints about unwanted calls than all other  
 24 complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer  
 25 Protection, *In re Rules and Regulations Implementing the Telephone Consumer*  
 26 *Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2  
 27 (2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/commentstaff-](https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-)  
 28

ftc-bureau-consumer-protection-federal-communications-commission-  
rulesregulations/160616robocallscomment.pdf.

19. In fiscal year 2017, the FTC received 4,501,967 complaints about robocalls, compared with 3,401,614 in 2016. Federal Trade Commission, *FTC Releases FY 2017 National Do Not Call Registry Data Book and DNC Mini Site* (Dec. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc>.

20. *The New York Times* recently reported on the skyrocketing number of robocall complaints and widespread outrage about illegal telemarketing. Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018), <https://www.nytimes.com/2018/05/06/your-money/robocalls-riseillegal.html>; see also Katherine Bindley, *Why Are There So Many Robocalls? Here's What You Can Do About Them*, Wall St. J. (July 4, 2018), <https://www.wsj.com/articles/why-there-are-so-manyrobocalls-heres-what-you-can-do-about-them-1530610203>.

21. Even more recently, a technology provider combating robocalls warned that nearly half of all calls to cell phones next year will be fraudulent. Press Release, First Orion, *Nearly 50% of U.S. Mobile Traffic Will Be Scam Calls by 2019* (Sept. 12, 2018), <https://www.prnewswire.com/news-releases/nearly-50-of-us-mobile-traffic-will-be-scam-calls-by-2019-300711028.html>

### **Factual Allegations**

22. Nation Motor provides extended warranty services to consumers.

23. To generate business through sales, Nation Motor relies on telemarketing.

1           24.     However, Nation Motor's contact with the potential new customers is  
2 limited, and the telemarketing is conducted by third parties.

3           25.     One of Nation Motor's strategies for telemarketing involves the use of an  
4 automatic telephone dialing system ("ATDS") to solicit business by third parties.

5           26.     Nation Motor's strategies for telemarketing also involve the use of pre-  
6 recorded messages to solicit business by third parties.

7           27.     Nation Motor engages this use of this equipment and the technology of  
8 recorded messages because it allows for thousands of automated calls to be placed at one  
9 time, but its telemarketing representatives, who are paid by the hour, only talk to  
10 individuals who pick up the telephone.

11           28.     Through this method, Nation Motor shifts the burden of wasted time to the  
12 consumers it calls with unsolicited messages.

13           29.     On December 11, 2018, Mr. Naiman received a call with a pre-recorded  
14 message from Hard Tack on his cellular telephone line, (925) 735-XXXX.

15           30.     The call was made with an ATDS because there was a distinct "click and  
16 pause" at the outset of the call. Furthermore, a pre-recorded message was played. It  
17 would be illogical to hand-dial a telephone number only to play a pre-recorded message.

18           31.     Furthermore, the call was sent from an area code local to the Plaintiff, 925-  
19 298-0729.

20           32.     Hard Tack is in Florida, and the fact that the telemarketing call came from a  
21 local area code is indicative of the fact that it was made by an ATDS, as an ATDS allows  
22 a caller to manipulate the Caller ID.

1           33.    Shortly after the call was connected to a live individual, and was able to  
2 identify that Nation Motor Club's services were being offered.

3           34.    On December 20, 2018, Mr. Naiman received a call with a pre-recorded  
4 message from Hard Tack on his cellular telephone line, (925) 735-XXXX.  
5

6           35.    The call was made with an ATDS because there was a distinct "click and  
7 pause" at the outset of the call. Furthermore, a pre-recorded message was played. It  
8 would be illogical to hand-dial a telephone number only to play a pre-recorded message.  
9

10          36.    Furthermore, the call was sent from an area code local to the Plaintiff, 925-  
11 298-0729.  
12

13          37.    Hard Tack is in Florida, and the fact that the telemarketing call came from a  
14 local area code is indicative of the fact that it was made by an ATDS, as an ATDS allows  
15 a caller to manipulate the Caller ID.  
16

17          38.    Shortly after the call was connected to a live individual, the connection was  
18 terminated.  
19

20          39.    On December 26, 2018, Mr. Naiman received a call with a pre-recorded  
21 message from Hard Tack on his cellular telephone line, (925) 735-XXXX.

22          40.    The call was made with an ATDS because there was a distinct "click and  
23 pause" at the outset of the call. Furthermore, a pre-recorded message was played. It  
24 would be illogical to hand-dial a telephone number only to play a pre-recorded message.  
25

26          41.    Furthermore, the call was sent from an area code local to the Plaintiff, 925-  
27 298-0729.  
28



1           42. Hard Tack is in Florida, and the fact that the telemarketing call came from a  
2 local area code is indicative of the fact that it was made by an ATDS, as an ATDS allows  
3 a caller to manipulate the Caller ID.  
4

5           43. Shortly after the call was connected to a live individual, the connection was  
6 terminated.  
7

8           44. The calls were not necessitated by an emergency.

9           45. All parties were in the United States during the calls.

10           46. Plaintiff's privacy has been violated by the above-described telemarketing  
11 robocalls from, or on behalf of, Defendants. The calls were an annoying, harassing  
12 nuisance.  
13

14           47. Plaintiff and all members of the Class, defined below, have been harmed by  
15 the acts of Defendants because their privacy has been violated, they were annoyed and  
16 harassed, and, in some instances, they were charged for incoming calls. The calls  
17 occupied his cellular telephone lines, rendering them unavailable for legitimate  
18 communication.  
19  
20

21           **Nation Motor's Liability and its Arrangement with Hard Tack**

22           48. For more than twenty years, the FCC has explained that its "rules generally  
23 establish that the party on whose behalf a solicitation is made bears ultimate  
24 responsibility for any violations." *In re Rules & Regulations Implementing the TCPA*, CC  
25 Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13)  
26 (1995).  
27  
28

1           49. On May 9, 2013, the FCC released a Declaratory Ruling holding that a  
 2 corporation or other entity that contracts out its telephone marketing “may be held  
 3 vicariously liable under federal common law principles of agency for violations of either  
 4 section 227(b) or section 227(c) that are committed by third-party telemarketers.”<sup>2</sup>

5  
 6           50. In that ruling, the FCC instructed that sellers such as Nation Motor may not  
 7 avoid liability by outsourcing telemarketing:  
 8

9           [A]llowing the seller to avoid potential liability by outsourcing its  
 10 telemarketing activities to unsupervised third parties would leave  
 11 consumers in many cases without an effective remedy for telemarketing  
 12 intrusions. This would particularly be so if the telemarketers were judgment  
 13 proof, unidentifiable, or located outside the United States, as is often the  
 14 case. Even where third-party telemarketers are identifiable, solvent, and  
 15 amenable to judgment limiting liability to the telemarketer that physically  
 16 places the call would make enforcement in many cases substantially more  
 17 expensive and less efficient, since consumers (or law enforcement  
 agencies) would be required to sue each marketer separately in order to  
 obtain effective relief. As the FTC noted, because “[s]ellers may have  
 thousands of ‘independent’ marketers, suing one or a few of them is  
 unlikely to make a substantive difference for consumer privacy.”

18 *May 2013 FCC Ruling*, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).  
 19

20           51. The May 2013 FCC Ruling held that, even absent evidence of a formal  
 21 contractual relationship between the seller and the telemarketer, a seller is liable for  
 22 telemarketing calls if the telemarketer “has apparent (if not actual) authority” to make the  
 23 calls. 28 FCC Rcd at 6586 (¶ 34).  
 24

25           52. The May 2013 FCC Ruling further clarifies the circumstances under which  
 26 a telemarketer has apparent authority:  
 27

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28 <sup>2</sup> *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling  
 Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

1 [A]pparent authority may be supported by evidence that the seller allows  
2 the outside sales entity access to information and systems that normally  
3 would be within the seller's exclusive control, including: access to detailed  
4 information regarding the nature and pricing of the seller's products and  
5 services or to the seller's customer information. The ability by the outside  
6 sales entity to enter consumer information into the seller's sales or  
7 customer systems, as well as the authority to use the seller's trade name,  
8 trademark and service mark may also be relevant. It may also be persuasive  
9 that the seller approved, wrote or reviewed the outside entity's  
10 telemarketing scripts. Finally, a seller would be responsible under the  
11 TCPA for the unauthorized conduct of a third-party telemarketer that is  
12 otherwise authorized to market on the seller's behalf if the seller knew (or  
13 reasonably should have known) that the telemarketer was violating the  
14 TCPA on the seller's behalf and the seller failed to take effective steps  
15 within its power to force the telemarketer to cease that conduct.

16 FCC Rcd at 6592 (¶ 46).

17 53. By engaging Hard Tack to make calls on behalf of its agents to generate  
18 new business, Nation Motor "manifest[ed] assent to another person . . . that the agent  
19 shall act on the principal's behalf and subject to the principal's control" as described in  
20 the Restatement (Third) of Agency.

21 54. Moreover, Nation Motor maintained interim control over Hard Tack's  
22 actions.

23 55. For example, Nation Motor had absolute control over whether, and under  
24 what circumstances, it would accept a customer.

25 56. Furthermore, Nation Motor had day-to-day control over Hard Tack's  
26 actions, including the ability to prohibit it from using an ATDS to contact potential  
27 customers of Nation Motor. Nation Motor failed to make such an instruction to Hard  
28 Tack, and as a result, is liable for Hard Tack's conduct.

1           57.     Additionally, Nation Motor restricted the geographic location and customer  
2 qualifications that Hard Tack could promote for Nation Motor.

3           58.     Nation Motor also gave interim instructions to Hard Tack by providing the  
4 volume of calling and leads it would purchase.

5           59.     Hard Tack transferred customer information directly to Nation Motor.  
6  
7 Thus, the company that Nation Motor hired has the “ability . . . to enter consumer  
8 information into the seller’s sales or customer systems,” as discussed in the May 2013  
9 FCC Ruling. As such, the company that Nation Motor hired is an apparent agent of  
10 Nation Motor.  
11

12           60.     Nation Motor had also previously been sued for the actions of third party  
13 telemarketers it hired, and as such was on notice that third parties, such as Hard Tack,  
14 were violating the TCPA on Nation Motor’s behalf.  
15

16           61.     Finally, the May 2013 FCC Ruling states that called parties may obtain  
17 “evidence of these kinds of relationships . . . through discovery, if they are not  
18 independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of  
19 circumstances pointing to apparent authority on behalf of the telemarketer “should be  
20 sufficient to place upon the seller the burden of demonstrating that a reasonable consumer  
21 would not sensibly assume that the telemarketer was acting as the seller’s authorized  
22 agent.” *Id.* at 6593 (¶ 46).  
23  
24  
25  
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**Class Action Allegations**

62. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of a class of all other persons or entities similarly situated throughout the United States.

63. The class of persons Plaintiff proposes to represent are tentatively defined as:

All persons within the United States to whom: (a) Hard Tack and/or a third party acting on their behalf, made one or more non-emergency telephone calls; (b) promoting Nation Motor and/or Hard Tack products or services; (c) to their cellular telephone number; (d) using an automatic telephone dialing system or an artificial or prerecorded voice; and (e) at any time in the period that begins four years before the date of the filing of this Complaint to trial.

Excluded from the class are the Defendants, and any entities in which the Defendants have a controlling interest, the Defendants' agents and employees, any judge to whom this action is assigned and any member of such judge's staff and immediate family.

64. The class as defined above is identifiable through phone records and phone number databases.

65. The potential class members number at least in the thousands, since automated telemarketing campaigns make calls to hundreds or thousands of individuals a day. Individual joinder of these persons is impracticable.

66. Plaintiff is a member of the proposed class.

67. There are questions of law and fact common to Plaintiff and to the proposed class, including but not limited to the following:

1           a.       Whether Defendants violated the TCPA by using automated  
2 telemarketing to call cellular telephones;

3           b.       Whether Defendants placed calls using an automatic telephone  
4 dialing system;

5           c.       Whether Nation Motor is vicariously liable for the conduct of Hard  
6 Tack;

7           d.       Whether Defendants placed calls without obtaining the recipients'  
8 prior consent for the call;

9           e.       Whether the Plaintiff and the class members are entitled to statutory  
10 damages because of Defendants' actions.

11           68.     Plaintiff's claims are typical of the claims of class members. Plaintiff's  
12 claims, like the claims of the Class arise out of the same common course of conduct by  
13 the defendants and are based on the same legal and remedial theories.

14           69.     Plaintiff is an adequate representative of the class because his interests do  
15 not conflict with the interests of the class, he will fairly and adequately protect the  
16 interests of the class, and he is represented by counsel skilled and experienced in class  
17 actions, including TCPA class actions.

18           70.     Common questions of law and fact predominate over questions affecting  
19 only individual class members. The only individual question concerns identification of  
20 class members, which will be ascertainable from records maintained by Defendants  
21 and/or their agents.

71. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the calls at issue are all automated. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. There will be no significant difficulty in the management of this case as a class action.

72. The likelihood that individual members of the class will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case.

### **First Cause of Action**

#### **Violation of the TCPA, 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200(a)**

73. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

74. The Defendants violated the TCPA by (a) initiating a telephone call using an automated dialing system or prerecorded voice to Plaintiff's telephone numbers assigned to a cellular telephone service, or (b) by the fact that others caused the initiation of those calls on its behalf. *See* 47 C.F.R. 64.1200(a)(1)(iii); 47 U.S.C. § 227(b)(1).

75. The Defendants' violations were negligent, willful, or knowing.

### **Prayer for Relief**

For himself and all class members, Plaintiff requests the following relief:

1. That Defendants be restrained from engaging in future telemarketing in violation of the TCPA.

1           2.     That Defendants, their agents, and anyone acting on their behalf, be  
2 immediately restrained from altering, deleting, or destroying any documents or records  
3 that could be used to identify class members.  
4

5           3.     That the Court certify the proposed class under Rule 23 of the Federal  
6 Rules of Civil Procedure.  
7

8           4.     That the Plaintiff and all class members be awarded statutory damages of  
9 \$500 for each negligent violation of the TCPA, and \$1,500 for each knowing violation,  
10 and all other relief that is joint and equitable.  
11

12           5.     The TCPA authorizes injunctive relief to prevent the Defendants from  
13 using automatic telephone dialing equipment.  
14

15           6.     The Plaintiff respectfully petitions this Court to order the Defendants, and  
16 their employees, agents and independent contractors, to immediately cease engaging in  
17 unsolicited telemarketing in violation of the TCPA.  
18

19           **Plaintiff requests a jury trial as to all claims of the complaint so triable.**  
20

21  
22 Dated: April 17, 2019

Respectfully Submitted,

/s/ Anthony Paronich

Anthony Paronich